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No. 90-387

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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LION UNIFORM, INC., JANESVILLE APPAREL DIVISION,
*Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## REPLY BRIEF FOR PETITIONER

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We explained in our petition (at 9-11) that Congress, in enacting the EAJA in 1980, deliberately chose to establish the presumptively independent adjudicative officer, not the agency itself, as the primary arbiter on attorney's fee awards in administrative proceedings. This decision was motivated by the concern that agencies would be institutionally reluctant to admit a mistake in bringing a case in the first instance. Congress's choice is unequivocally expressed on the face of the statute, which provides that an agency "shall award" fees to a prevailing party "unless the adjudicative officer of the agency finds that

the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). That language is unique in the United States Code for the explicitness with which it directs that a particular administrative task be performed by the adjudicative officer, rather than by the agency. Moreover, the statutory language closely parallels the language elsewhere in the EAJA (28 U.S.C. § 2412(d)(1)(A)) that established the district courts as the primary arbiters on attorney's fee applications in judicial proceedings, subject to a deferential standard of review. *See Pierce v. Underwood*, 487 U.S. 552, 559 (1988).

The government does not directly take issue with these propositions. Instead, it dismisses the original language and history of the statute as irrelevant and rests its defense of the decision below entirely upon the submission that a one-sentence 1985 amendment empowers the agency to conduct a *de novo* review of the adjudicative officer's initial determination, thereby making the agency itself the primary arbiter.[1] That submission, in turn, rests not on the text of the amendment, but rather upon a fragment of a single

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[1] Although it sees no need to discuss the text or background of the original 1980 legislation, the government does not appear to contend that Congress in 1985 actually altered the statutory allocation of responsibility for ruling on attorney's fees in administrative adjudications. Rather, the government repeatedly characterizes the 1985 addition as a "clarifying amendment" (*see* Br. in Opp. 11, 12, 14 n.11). Thus, the government maintains that, from its inception in 1980, Section 504 established the agency as the primary arbiter on fee applications—a contention that is completely untenable on the face of the statute and, indeed, represents a rule that Congress specifically rejected in its deliberations in 1980. *See* Pet. 10.

sentence in the House Report accompanying the 1985 amendment.

The government's contention is flawed in two major respects. First, it exalts letters submitted to Congress and other legislative history materials above the text of the statute, which continues to assign primary responsibility for ruling on fee applications to the adjudicative officer. Second, the government seriously misconstrues the legislative history of the 1985 amendment, which in fact gives no indication that Congress ever intended to confer on agencies the power to review *de novo* the fee awards made by adjudicative officers.

1. The 1985 amendment added a sentence stating that "[t]he decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section." 5 U.S.C. § 504(a)(3). By its terms, this provision deals only with whether the adjudicative officer's determination is final; it suggests nothing about the standard under which that determination should be reviewed. Indeed, the 1985 amendment leaves intact—and controlling—the key phrase in Section 504(a)(1) that explicitly confers decisional authority on the adjudicative officer and thus negates the contention that the agency is free to substitute its judgment *de novo* for that of the trier of fact.

The government offers no explanation of how its theory can be squared with the statutory text. In effect, it reads the statute as if Section 504(a)(1) stated that a fee award should be made "unless the *agency* finds that the position of the agency was substantially justified." Congress could have drafted the statute that way, but it did not. To the contrary, it

specifically considered and rejected the language that the government seeks to read into the statute (*see* Pet. 10); it deliberately chose instead to place in the hands of the adjudicative officer the primary authority for ruling on fee applications. The decision below represents a substantial, and totally unjustified, revision of the statute actually enacted by Congress.

2. In any event, the legislative history of the 1985 amendment lends no support to the government's effort to rewrite Section 504. Subsequent to 1980, a dispute arose over whether the statute provided for some form of agency review of the adjudicative officer's ruling on fees or, alternatively, whether it made that ruling final and directly subject to judicial review without any agency review at all. As the government notes (Br. in Opp. 10-11), legislation was passed in 1984 that would have resolved this dispute in favor of making the adjudicative officer's decision final, but that legislation was vetoed by the President.

When Congress revisited the issue in 1985 and reached a different conclusion, it again focused on whether the adjudicative officer's decision should be final or subject to *some* agency review. There is not a shred of evidence to support the government's assertion (Br. in Opp. 12) that "[t]he issue as framed in the hearings was whether a standard other than the normal APA standard of review should apply." To the contrary, all of the testimony before Congress, including the material cited by the government, addressed only the question whether there should be agency review at all, not the appropriate standard.

In particular, the letters from Loren Smith, the Chairman of the Administrative Conference, upon which the government so heavily relies (*see* Br. in

Opp. 12-13), repeatedly state that their purpose is to oppose "the *elimination* of agency review of fee determinations by administrative law judges" (a reference to the legislation that had been vetoed in 1984). *Equal Access to Justice Act Amendments: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 72 (1985) (emphasis added). *See also id.* at 73, 74. In the course of a background discussion of general agency procedures one of the letters alludes to the standard of review applied by agencies on the merits, but the letters clearly do not purport to address what standard of review should be applied on fee applications if Congress were to agree to retreat from its 1984 position that the adjudicative officer's decision should be final. All of the specific objections raised in the letters to the *elimination* of agency review are satisfied by providing some form of review, regardless of the standard. Thus, the government's assertion that these letters indicate that Congress "contemplated" (Br. in Opp. 8-9) and deliberately adopted a *de novo* standard of agency review under Section 504 is fanciful.

The full context of the sentence fragment from the House Report relied upon by the government further confirms that Congress did not intend to establish *de novo* review when it made clear that the adjudicative officer's decision would not be final. The House Report states (H.R. Rep. No. 120, 99th Cong., 1st Sess. 14 (1985)):

> This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section

> 504. This follows the view adopted by the Administrative Conference and recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency. This amendment ratifies the approach taken by the courts in *McDonald* v. *Schweiker*, 726 F.2d 311 (7th Cir. 1983) and *Mass. Union Public Housing Tenants* v. *Pierce*, 755 F.2d 177 (D.C. Cir. 1985).

The Report, in stating that it was following the view of the Administrative Conference, was merely referring to the Administrative Conference's expressed objection to the complete elimination of agency review of fee determinations, and the quoted section suggests nothing about Congress's intent regarding the standard of review.[2]

The decision below, therefore, unjustifiably overturns the congressional choice—expressed in the stat-

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[2] The two decisions cited in the House Report are instructive. Neither decision concerned, or even mentioned, the standard of review. Both cases held that a court decision on the merits is not "final," for purposes of triggering the period under the EAJA within which a fee application must be filed, until after the appeal has been concluded, thereby rejecting the government's contention that the application must be filed within 30 days of the district court's decision. The House Report's reference to these cases as analogous to the 1985 amendment to Section 504 thus reflects the view that, contrary to the government's submission (Br. in Opp. 15), the relationship between the adjudicative officer and the agency on fee applications is analogous to the relationship between the district court and the court of appeals. That analogy strongly suggests that the *Pierce* rule of deference should apply to review by agencies of adjudicative officers' fee rulings just as it applies to court of appeals review of district court decisions.

ute and reflected in the legislative history—to make the adjudicative officer the primary arbiter on fee applications, entitled to the same standard of deferential review accorded to district courts under *Pierce v. Underwood*. Unless this decision flouting the congressional will is reviewed by this Court, a large class of cases will be severed from the consistent framework established by the EAJA and *Pierce*, and attorney's fee claimants in those cases will have to surmount a hurdle that Congress deliberately sought to remove. *See* Pet. 15-16.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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